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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

PRATT, HELEN F

ART UNIT PAPER NUMBER

1761

DATE MAILED: 12/23/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/022,130

Applicant(s)

FITZPATRICK, MICHAEL

Examiner

Helen F. Pratt

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7, 8, 10 and 12-15, 17-20 is/are rejected.
- 7) ☒ Claim(s) 5, 6, 9, 11 and 16 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). ____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____ 6) ☐ Other: ____

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 7 and 8 recite the limitation "the relative humidity of the environment" in line 2. There is insufficient antecedent basis for this limitation in the claim. No antecedent basis is seen in claim 13c, for "the sliced mixture". No basis is seen in claim 14 for the phrase "reducing the relative humidity of the area" in claim 13.

No period is seen at the end of claims 15 and 17.

No antecedent basis is seen in claim 17 for the phrase "after said specified time".

No antecedent basis is seen in claim 18 for the phrase "the sliced mixture".

In claim 20, the phrase in step "a" of "0.7 of less than 0.75" is not understood. The phrase could read of "0.7, but less than 0.75".

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4, 7, 8, 10, 12-15, 17, 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Galak (4,006,255) and Burkwall, Jr. (3,974,296).

Gralak discloses a process of treating grits with a gum which can be from chia seeds, heating the mixture, and drying the mixture on a drum drier, then comminuting the cooked dried sheet, and blending with a protein flavoring (abstract and col. 2, lines 15-20). Grits are known to be very small and less than ½ inch in size as in step (a). The food (grits) is mixed with water, a gum capable of rehydration, and vitamins and antioxidants as in step b and then the mixture is heated and dried as in steps c and d. Burkwall, Jr. discloses a process of making a pet food by combining egg solids and other ingredients with an edible water absorbing hydrocolloid which can be chia seed gum, and vegetable material and processing it so that it will have a particular pH and water activity (abstract, and col. 4, lines 35-45). Egg solids are seen to be smaller than 1/2 inch as in step a. The mixture is hydrated using water as in step b and an agglutinate such as chia gum is used as in step c and the water activity is from .70 to .90 (col. 7, lines 20-26 and lines 45-65). The above mixtures are seen to have been agglutinated because gum from the claimed Chia seed is used and since it is a polysaccharide, it performs a gelling type function such as agglutination. Claims 1 and 2 differ from the references in the use of whole chia seed. However as the active ingredient has been disclosed, it would have been a matter of choice as to use whole chia seeds, which of course contain roughage in the seed coat. Therefore, it would have been obvious to make a product using the process of the above references.

Claim 3 further requires spreading the agglutinated mixture onto a double access-drying surface. Such a surface is disclosed by Gralak who uses an internally

heated rotating double drum drier (col. 6, lines 67-68 and col. 7, lines 1-5). Therefore, it would have been obvious to dry on such a surface as disclosed by Gralak.

Claims 4 and 12 further require that the mixture be reduced to less than 0.60 to inhibit spoilage by microorganisms. However, it is seen that it would have been within the skill of the ordinary worker to dry to a particular A_w given the particular ingredients involved since it is known to dry at higher levels. Certainly, the technology of lowering the moisture level is known, so nothing new is seen in lowering the A_w level to a particular level. Therefore, it would have been obvious to dry to a particular level to reduce spoilage.

Claims 7 and 8 further require reducing the relative humidity of the environment and a particular water activity. However, it would have been within the skill of the ordinary worker to process in a particular environment with a particular humidity. Therefore, it would have been obvious to process in a particular environment with a particular humidity.

Claim 10 further requires allowing the chia seeds to absorb liquid. Even though chia seed are not disclosed, the active ingredient in the seeds, which is the gum, has been disclosed and gums are known for their ability to absorb liquid in order to produce their gelling characteristics. Therefore, it would have been obvious to allow the chia gum to absorb liquid, which is its known function.

Claim 13 further requires that there is no gluten containing ingredients in the composition to cause agglutination and that the water activity was reduced below 0.60. The A_w has been discussed above. No such gluten containing ingredients are

disclosed in Gralak or in Burkwall, Jr. Therefore, it would have been obvious to make a composition containing the claimed ingredients as shown by the above references.

The limitations of claims 14 and 15 have been discussed above and are obvious for those reasons.

Claim 17 further requires slicing the mixture after a specified period of time. However, it is well known to let a food product set before slicing so that it can equilibrate. Therefore, it would have been obvious to let the mixture set for a period of time before slicing.

Claim 18 further requires rehydrating the sliced mixture to a A_w of 0.65. Gralak discloses that the dried grits mixture is mixed with a moist proteinaceous flavoring material until the product is dry. Even though the reference to Gralak does not disclose a particular A_w , the product would have had to be dried to a level, which would not allow the growth of bacteria. Therefore, it would have been obvious to use particular moisture levels (A_w).

Claim 19 is also a product by process claim. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is based upon the product formed and not the method by which it was produced. See *In re Thorpe* 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See *Ex parte Jungfer* 18 USPQ 2D 1796. The limitations of claim 19 have been disclosed above and are obvious for those reasons.

The limitations of claim 20 have also been disclosed above and are obvious for those reasons. Nothing is seen that the water activity of Gralak is not within the claimed range, and Burkwall, Jr. discloses that the claimed range is known. The difference as to the use of whole chia seeds has been discussed above and is obvious for those reasons. Therefore, it would have been obvious to make a product containing chia seed ingredients as claimed.

Allowable Subject Matter

Claims 5, 6, 9, 11 and 16 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 12-11-03


HELEN PRATT
PRIMARY EXAMINER